



**NEVADA COMMISSION ON ETHICS
EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION
REGARDING JUST AND SUFFICIENT CAUSE**

REQUEST FOR OPINION NO. 06-30

SUBJECT: GARY WATERS, MEMBER,
NEVADA STATE BOARD OF EDUCATION

A. JURISDICTION:

In his capacity as a member of the Nevada State Board of Education, Gary Waters is a public officer as defined by NRS 281.4365. As such, the Nevada Commission on Ethics has jurisdiction over this complaint.

B. REPORT OF INVESTIGATIVE ACTIVITIES:

- Reviewed Request for Opinion 06-30 received June 5, 2006, "Supplemental Form" received June 23, 2006, and information received on or about July 21, 2006, regarding a \$1.2 million federal suicide prevention grant (TAB B)
- Received "Waiver of Statutory Time Requirement" from Gary Waters on July 18, 2006. Met with Gary Waters and received his response on July 20, 2006; reviewed additional support documentation submitted July 24, 2006 (TAB C)
- Reviewed The Regular Meeting Agendas and Minutes for March 3 & 4, 2006, April 28 & 29, 2006, and June 2 & 3, 2006 of the Nevada State Board of Education (TAB D)
- Reviewed audio CD of discussion of Agenda Item 10, June 2 & 3, 2006, Nevada State Board of Education Regular Meeting
- Reviewed Recommendation for Proposed Wording Regarding the Establishment of State Standards for Supplemental Mental Health and Suicide Prevention Programs (TAB E)
- Interviewed Cliff Ferry, President, Nevada State Board of Education on July 12, 2006
- Interviewed Keith W. Rheault, Superintendent of Public Instruction, Nevada Department of Education on July 13, 2006

- Reviewed two newspaper articles regarding this matter (TAB F)

C. RECOMMENDATIONS:

Based on investigative activities, it is hereby recommended that the Panel find just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion in this matter relating to the provisions of:

- NRS 281.481 (2)
- NRS 281.481 (7)
- NRS 281.501 (2)
- NRS 281.501 (4)

SPECIFIC REASON:

There are no allegations or credible evidence of fact that amounts to or supports a violation by the subject of the above provisions of NRS Chapter 281.

D. SUMMARY OF REQUEST FOR OPINION:

Joe Enge, Chairman of EdWatch Nevada, submitted this Request for Opinion (complaint) on June 5, 2006. The complaint alleges violations of NRS 281.481(2), 281.481(7), 281.501(2), and 281.501(4) by Gary Waters, member of the Nevada State Board of Education. The complaint alleges Mr. Waters violated the Ethics in Government Law when he:

- Formed a non-profit organization called the Center for Health and Learning for the purpose of receiving state and federal grant money;
- Filed the non-profit organization with the Secretary of State on April 5, 2005, listing the resident agent as the Nevada Department of Education, 1820 E. Sahara Avenue, Las Vegas, 89104, thereby using state office space for the organization's activities;
- Included himself and Nevada Department of Education staff as officers for the organization thereby using State resources or personnel for the organization's formation or activities; and
- Failed to disclose his relationship to this issue and potential private benefits before, during, or after the June 3, 2006, Nevada State Board of Education Meeting discussion on Mr. Waters' proposal to establish State standards for supplemental mental health and suicide prevention education programs in Nevada Public Schools.

E. SUMMARY OF SUBJECT'S RESPONSE:

Mr. Waters submitted a *Waiver of Statutory Time Requirement* on July 18, 2006. Mr. Waters submitted his response on July 20, 2006 and additional documentation on July 24, 2006. The following information was provided in response to the allegations:

- The Center for Health and Learning received state grant funds from the Trust Fund for Public Health following the request by the Clark County Health District (now the Southern Nevada Health District) to administer the last 4 months of a three-year grant which the Health District had been awarded in 2003. The Superintendent of Public Instruction, Dr. Keith Rheault, approved this action to assist the Health District in what was viewed by him as a productive and meaningful program for school age youth. Dr. Rheault has the authority for such action as the Chief State School Officer. This program has ended and is no longer in operation. Gary Waters was a contractor with the Clark County Health District and involved in two Clark County Health District programs 1) Columbia TeenScreen (2003-2006) and Transitional Care Services (HIV-Ryan White/ 2005-2006). Neither the State Board of Education nor the Nevada Department of Education sought or applied for either of the grants. Neither the Nevada State Board of Education nor the Nevada Department of Education has any grant requests pending or is planning on receiving any grant funding in which the Center for Health and Learning is involved in any way. The Center for health and learning was not set up to receive grant money, or money of any other kind, and specifically, not money provided by the Clark County Health District or other government agency. The Center was initiated to promote wellness of school age youth. Mr. Waters did not need the Center for Health and Learning to receive funds from the Clark County Health District as he had been a consultant for the Health District since 2002, and had the ability to receive funds independently and directly from the Health District. Mr. Waters does not have any current or anticipated contracts for services with the Clark County Health District. His last contracted service for the Health District was on March 30, 2006.
- The Center for Health and Learning was organized in the same way as other educational service organizations had been organized previously, such as the Nevada Public Education Foundation and the Nevada FFA Foundation. The resident agent has never been the Nevada Department of Education, but has always been a person. Any listing of the Department of Education as the resident agent on the initial filing with the Nevada Secretary of State would have been an error. The address for the Center for Health and Learning was initially listed (April 2005) as the Nevada Department of Education as was likewise with the Nevada Public Education Foundation and the Nevada FFA Foundation. However, because no mail was ever received at the Nevada Department of Education, the legal of the address of the Center from July 2005 was that of a listed officer of the Board of Directors for the Center. The Center was donated a telephone from the Clark County Health District and shared an office with the Nevada Health Centers, Incorporated, neither of which are connected to the Nevada Department of Education.
- State offices of the Nevada Department of Education were not used by the Center for Health and Learning. The Nevada Department of Education offered the University of Nevada - Las Vegas use of the training room (with specific permission granted by the State

Superintendent of Public Instruction) in September 2005 for a three-hour training of graduate student interns in social work. Gary Waters was a participant at this training and NOT a facilitator of it. The Training focused on mental health screening and the Columbia TeenScreen Program. The entire training was facilitated by Columbia TeenScreen personnel and lasted no more than 3 hours. Gary Waters is authorized use of the Nevada Department of Education offices equal to that of all other State Board of Education members. The Center for Health and Learning had no need for use of the Nevada Department of Education offices as the Center was provided facilities and offices by the Clark County Health District and shared clinical office space with Nevada Health Centers. Activities related to Columbia TeenScreen were conducted exclusively in ten public high school facilities of the Clark County School District. Communications related to the Center for Health and Learning were largely electronic, via computer, which was not funded in any way by the State of Nevada or the Nevada Department of Education. Telephone service was and continues to be provided by the Clark County (Southern Nevada) Health District. State Department of Education staff has served, and continues to serve, as members of the Center for Health and Learning Board of Directors. Gary Waters serves on the Board of the Nevada FFA Foundation and the Center for Health and Learning. Service on these boards is directly related to expertise in the mission and objectives of the organizations and time available to volunteer for such work. There is no compensation of any type for serving on any of these boards. The State Board of Education does not have any authority over the Center for Health and Learning and does not authorize or have responsibility for any of its activities. The Center for Health and Learning is a private non-profit organization and not connected structurally or organizationally to the State of Nevada, Nevada Department of Education or the State Board of Education. The Nevada Department of Education provided in-service re-certification credit for health teachers associated with the Columbia TeenScreen Program. This credit was provided at no cost to teachers and neither the Center for Health and Learning or Gary Waters received any compensation of any kind for providing in-service credit or the administration and proctoring of credit for teachers. Any use of facilities of the Nevada Department of Education by any non-profit group must have the approval of the State Superintendent of Public Instruction or his designee. There is frequent public access (pending space availability) to Nevada Department of Education facilities by multiple Nevada school districts, private non-profit educational organizations and any legitimate public organizations groups or other entities upon request.

- In multiple meetings of the Nevada State Board of Education the formulation, operation, goals, objectives, missions, activities and involvement of Gary Waters has been provided the Board. These are a matter of public record. Specifically, in April 2006, Gary Waters made a formal presentation to the State Board of Education recognizing student volunteers, providing certificates of appreciation to volunteers, and explaining to the board the activities of the Center as well as Mr. Waters' involvement with the Center and the school mental health program over the past year. There have been multiple disclosures to the Board of Education by Mr. Waters as well as numerous hand-outs on statistical and program information related to the Center for Health and Learning and Mr. Waters' involvement with it. Mr. Waters does not now, nor has he ever, received a

salary or wage from the Center for Health and Learning. Mr. Waters, in 2004-2005, received contract compensation from the Clark County Health District.

- During the June 3, 2006 Board of Education Meeting, legal counsel for the Nevada Department of Education, Mr. Ed Irvin, advised the State Board of Education President, Dr. Cliff Ferry, not to respond to Mr. Enge's questions because the discussion was not on the posted agenda and doing so may violate the open meeting law. An information "packet" supplied to the Board by Mr. Enge was clearly out of date and contained inaccurate information. To assist Mr. Enge, Mr. Waters offered (and Mr. Enge accepted) an invitation to an immediate private consultation related to Mr. Enge's stated concerns. A private conversation of this type would not violate the open meeting law and was offered to Mr. Enge as a way to provide him with updated information and to respond to his concerns. The private meeting lasted for more than one hour and was conducted immediately following Mr. Enge's comments to the board and concurrently to the State Board of Education Meeting.

F. PERTINENT STATUTES AND REGULATIONS:

NRS 281.481 General requirements; exceptions. A code of ethical standards is hereby established to govern the conduct of public officers and employees:

* * * * *

2. A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281.501.

(b) "Unwarranted" means without justification or adequate reason.

* * * * *

7. A public officer or employee, other than a member of the Legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of his public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

NRS 281.501 Additional standards: Voting by public officers; disclosures required of public officers and employees; effect of abstention from voting on quorum; Legislators authorized to file written disclosure.

* * * * *

2. Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

- (a) His acceptance of a gift or loan;
- (b) His pecuniary interest; or
- (c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

* * * * *

4. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

- (a) Regarding which he has accepted a gift or loan;
- (b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or
- (c) In which he has a pecuniary interest,

without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign

contributions that the public officer reported pursuant to [NRS 294A.120](#) or [294A.125](#) in a timely manner.

G. RESULTS OF INVESTIGATION:

Factual History:

In April 2005 Nonprofit Articles of Incorporation for the “Center for Health and Learning” were filed with the Secretary of State’s Office by Gary Waters. The Articles named the Nevada Department of Education as resident agent and Gary Waters and at least one other Nevada Department of Education employee as directors.

In September 2005 The “Initial List of Officers, Directors, and Resident Agent” were filed with the Secretary of State’s Office and listed Gary Waters as treasurer, at least one other Department of Education employee as a director and the Nevada Department of Education as resident agent. All officers and directors were listed at either the Carson City or the Las Vegas address for the Nevada Department of Education.

In May 2006 the website for the Center for Health and Learning (www.healthlearning.org) states that it is a “not-for-profit educational and therapeutic organization established to promote health, wellness, educational achievement and lifelong learning.” The website lists the organizations location as the Center for health and Learning, Nevada Department of Education, 1820 East Sahara Avenue, Suite 200, Las Vegas, Nevada, 89104. The website also lists “Staff, Faculty, Volunteers and Advisors” names including Gary Walters, the Superintendent of Public Instruction for Nevada Department of Education, and at least one other Nevada Department of Education employee.

As of June 2006 a “Certificate of Change of Resident Agent and/or Location of Registered Office” form was filed changing the resident agent name and location from that of the Nevada Department of Education. Additionally, the website for the Center for Health and learning is not accessible at this time, stating that it is temporarily under construction.

Mr. Waters introduced an agenda item for “information/discussion/action” at the March, April and June 2006 Nevada State Board of Education meetings regarding proposed standards for supplemental mental health and suicide prevention education programs offered within the Nevada public school districts. The Center for Health and Learning, founded by Mr. Waters, would be subject to such proposed regulations. The minutes of these meetings do not indicate that Mr. Waters disclosed his relationship with the Center for Health and Learning during discussion of the agenda item.

Telephone interviews were conducted with both the President of the Nevada State Board of Education and the Superintendent of Public Instruction, Nevada Department of Education. Both the President and Superintendent confirmed their awareness of Mr.

Waters' affiliation with the Center for Health and Learning. The Superintendent indicated the following:

- Even though the Center is not a State Board chartered non-profit, he sees it as similar to other non-profits the Board works with, established under NRS 385.091, which allows the State Board of Education to establish a nonprofit corporation “for the acquisition of money and personal property for awards in recognition of exceptional teachers, pupils and public schools and for special projects regarding educational enhancement, including, but not limited to, any unique educational activity which is conducted by officials of the public schools to improve the educational performance of or learning opportunities for pupils or teachers in the public schools” (NRS 385.091);
- He is supportive of such organizations because they lack staffing in these areas.
- The Center originally received funding from the Clark County Health District through a sub-grant, and in January the Department of Education became the fiscal agent for the grant;
- If adopted, The regulations proposed for standards of mental health programs would be effective for all school districts and charter schools, would not create a sole source environment, and would be subject to the discretion of each local school board;
- The Board never voted to be involved in establishing the Center, but all agreed to be supportive of its mission;
- Vacant office space located in the Department of Education Las Vegas office was available for use by the Center as well as other similar organizations.

Allegations regarding NRS 281.481(2):

NRS 281.481(2) states:

“A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) “Commitment in a private capacity to the interests of that person” has the meaning ascribed to “commitment in a private capacity to the interests of others” in subsection 8 of NRS 281.501.

(b) “Unwarranted” means without justification or adequate reason.”

There is no evidentiary basis to support the allegation that Mr. Waters acted in violation of NRS 281.481(2). Mr. Waters receives no compensation from the Center for Health and Learning and the regulations he is proposing will not create a sole source environment for services offered through the Center. Additionally, similar organizations are also allowed to use the Department of Education facilities when available.

Allegations regarding NRS 281.481(7):

“A public officer or employee, other than a member of the Legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of his public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.”

There is no evidentiary basis to support the allegation that Mr. Waters acted in violation of NRS 281.481(7). The Department of Education Superintendent of Public Instruction indicated that he sees the Center for Health and Learning as similar to other non-profits with which the Board works established under NRS 385.091. It appears that any use of government property and equipment was authorized, did not interfere with the performance of any public officer’s duties to the public, and the cost or value related to the use was nominal. Furthermore, the Center for Health and Learning appears to have been established within Mr. Waters’ official capacity as a member of the Nevada Board of Education, and there is no evidence indicating that he received personal or financial gain from the Center.

Allegations regarding NRS 281.501(2):

NRS 281.501(2) states:

“Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.”

There is no evidentiary basis to support the allegation that Mr. Waters acted in violation of NRS 281.501(2). The regulations proposed by Mr. Waters will have equal impact on all organizations offering services similar to those of the Center for Health and Learning.

Allegations regarding NRS 281.501(4):

NRS 281.501(4) states:

“A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

(a) Regarding which he has accepted a gift or loan;

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or

(c) In which he has a pecuniary interest,

without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 in a timely manner.”

There is no evidentiary basis to support the allegation that Mr. Waters acted in violation of NRS 281.501(4). The Center for Health and Learning appears to have been established within Mr. Waters’ official capacity as a member of the Nevada Board of Education, and there is no evidence indicating that he received personal or financial gain from the Center. Furthermore, the Center’s existence was well known by Department and Board of Education personnel, some of whom were also involved as volunteers with the Center.

H. CONCLUSION:

It is hereby recommended the panel find just and sufficient cause DOES NOT EXIST for the Commission to hold a hearing and render an opinion on the allegations that the subject violated NRS 281.481(2), NRS 281.481(7), NRS 281.501(2) and NRS 281.501(4). Furthermore, it is recommended that the allegations regarding NRS 281.481(2), NRS 281.481(7), NRS 281.501(2) and NRS 281.501(4) be dismissed.

Prepared by: Matt C. DiOrto DATED: August 28, 2006
MATT C. DI ORIO
SENIOR INVESTIGATOR

Approved by: L. Patrick Hearn DATED: 9-1-06
L. PATRICK HEARN
EXECUTIVE DIRECTOR